

RICKY THONG YEW FOOK

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v.

OCBC BANK (MALAYSIA) BHD

HIGH COURT MALAYA, PENANG

b

RK NATHAN J

[ORIGINATING SUMMONS NO: 24-552-2002]

26 MARCH 2003

COMPANY LAW: *Winding-up - Liquidator - Recovery of property - Charge by way of pledge of Fixed Deposit - Collateral not registered by creditor - Whether void for want of registration - Whether monies thereof recoverable by liquidator - Companies Act 1965, s. 108(3)(k) - Applicability*

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The defendant had granted financial facilities to one Zanshin Plastic Industrial Sdn Bhd ('the company') upon the security *inter alia* of a pledge of RM500,000 executed by the company by way of a Fixed Deposit ('the Fixed Deposit'). Notwithstanding that the Fixed Deposit had been so charged to the defendant, the defendant had not however registered the same as a charge under s. 108(3)(k) of the Companies Act 1965 ('the Act'). Subsequently, following the voluntary liquidation of the company, the plaintiff liquidator claimed that the pledge was void as against him, and that the Fixed Deposit ought rightly to be handed over to him as the defendant had no lawful dominion over same. Before the learned judge, the question that arose was whether the liquidator's claim herein must succeed, considering that the defendant had neither registered the Fixed Deposit under the Act nor exercised its right to set-off prior to the winding-up of the company.

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Held:

[1] The charge as exhibited does not reflect the Fixed Deposit of RM500,000 to comply with the requirement of s. 108(3)(k) of the Act. On the contrary, the charge reflects the existence of a debenture and this is in compliance with s. 108(3)(a) of the Act. What is in issue however is the Fixed Deposit and not the debenture. In the circumstances, the charge which has not been registered under s. 108(3)(k) of the Act to reflect the Fixed Deposit is void as against the liquidator. (p 485 e)

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[2] Section 108(3)(k) of the Act obliges the defendant to create a charge on the credit balance of the company in any deposit account and a Fixed Deposit Account falls into this category. Since this was not done, the liquidator is entitled to the orders sought for. (p 489 g)

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[Application allowed.]

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a Case(s) referred to:

Arab Malaysian Merchant Bank Bhd v. Orient Apparel Bhd & Ors [2001] 4 CLJ 572 HC (**refd**)

Asia Commercial Finance (M) Bhd v. JB Precision Moulding Industries Sdn Bhd (In Liquidation) [1996] 2 CLJ 547 FC (**refd**)

b *Sime Diamond Leasing (M) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd (In Liquidation)* [1998] 4 CLJ 557 FC (**refd**)

Legislation referred to:

Bankruptcy Act 1967, ss. 41(1), 53(1)

Companies Act 1965, ss. 53(1), 108(1), (3)(a), (k), 223, 255(6), 291(2), 293

c *For the plaintiff - Kaushalya Rajathurai; M/s Cheang & Ariff*

For the defendant - KK Chan; M/s Shook Lin & Bok

Reported by WA Sharif

JUDGMENT**d RK Nathan J:****Facts**

e The plaintiff was appointed by the directors of Zanshin Plastic Industrial Sdn. Bhd. (in liquidation) (the company) as the provisional liquidator for the period 11 June 1998 to 7 July 1998. Subsequently by a court order dated 27 August 1998 the plaintiff was duly confirmed the liquidator effective from 7 July 1998. The defendant had given various financial facilities to the company including a facility agreement dated 15 July 1996 and three debentures dated 19 August 1996, 27 December 1996 and 23 June 1997 (the debentures). The company

f had also accepted a letter of offer dated 5 April 1997 for further additional credit facilities from the defendant. In the meantime voluntary winding-up of the company commenced on 11 June 1998 and two persons were appointed by the defendant on 13 June 1998 as the receivers and managers, under the terms of the debentures.

g By the letter of offer dated 5 April 1997 the defendant had offered further credit facilities to the company to be secured among others by a pledge of RM500,000 by way of a Fixed Deposit. On 8 April 1997, two Directors' Circular Resolutions pursuant art. 90 of the company's Articles of Association were passed to accept the defendant's letter of offer dated 5 April 1997 and

h to place funds in a Fixed Deposit with the defendant for RM500,000. Together with the Directors' Circular Resolutions the company had also forwarded to the defendant the letter of set-off duly executed by the company.

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The Plaintiff's Case

It is the plaintiff's case that the defendant did not exercise the right to set-off prior to the voluntary winding-up of the company. The plaintiff further contends that although the Fixed Deposit had become an asset charged to the defendant under the terms of the debentures, however, the defendant had failed to register the Fixed Deposit as a charge pursuant to s. 108(3)(k) of the Companies Act 1965 (the Act).

The plaintiff therefore prayed for:

- (a) a declaration that the charge consisting of a pledge of a Fixed Deposit Certificate No. 731-314184-0 in the amount of RM500,000 by the company to the defendant is void against the liquidator, the plaintiff, for want of registration under s. 108(3)(k) of the Companies Act 1965.
- (b) consequently, for a declaration that the RM500,000 held under Fixed Deposit Certificate No. 731-314184-0 be handed over to the plaintiff, the liquidator for the company.
- (c) alternatively for a declaration that in the event the RM500,000 Fixed Deposit held under Certificate No. 731-314184-0 has been liquidated by the defendant, that the charge to the defendant is void against the liquidator of the company, the plaintiff for want of registration under s. 108(3)(k) of the Companies Act 1965.
- (d) and consequently for a declaration that the defendant duly pays to the plaintiff, the liquidator for the company the sum of RM500,000 within twenty one (21) days from the date of the order of this court.
- (e) interest at the rate of 9.2% per annum from date of liquidation to full settlement.
- (f) costs of these proceedings.

Findings Of The Court

It is pertinent, for the purposes of considering the plaintiff's arguments to reproduce s. 108(1) & (3)(a-k) of the Act which read as follows:

108 Registration of charges

- (1) Subject to this Division where a charge to which this section applies is created by a company, there shall be lodged with the Registrar for registration within thirty days after the creation of the charge a statement of the prescribed particulars, and if this section is not complied with in relation to the charge, the charge shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company.

- a* (2) –
- (3) The charges to which this section applies are:
- (a) a charge to secure any issue of debentures;
- (b) a charge on uncalled share capital of a company;
- b* (c) a charge on shares of a subsidiary of the company which are owned by the company;
- (d) a charge or an assignment created or evidenced by an instrument which if executed by an individual within West Malaysia and affecting property within West Malaysia would be invalid or of limited effect if not filed or registered under the Bills of Sale Act 1950;
- c* (e) a charge on land wherever situate or any interest therein;
- (f) a charge on book debts of the company;
- d* (g) a floating charge on the undertaking or property of a company;
- (h) a charge on calls made but not paid;
- (i) a charge on a ship or aircraft or any share in a ship or aircraft;
- (j) a charge on goodwill, on a patent or licence under a patent, on a trade mark, or on a copyright or a licence under a copyright; and
- e* (k) a charge on the credit balance of the company in any deposit account.

f By virtue of s. 111 of the Act the registrar must keep a register of all the charges lodged for registration and will issue a certificate of every registration and the said certificate shall be conclusive evidence that the requirements as to registration have been complied with. The said certificate to be issued by the registrar is in the prescribed Form 40 of the Act.

In this case the Form 40 exhibited by the defendant is reproduced and it reads as follows:

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PEJABAT PENDAFTAR SYARIKAT
(Registry of Companies)
MALAYSIA

BORANG 40

h AKTA SYARIKAT 1965
[Seksyen 111 (2)]

No. Syarikat
358474 H

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PERAKUAN PENDAFTARAN GADAIAN

Adalah diperakui bahawa suatu gadaian bertarikh 23 haribulan Jun 1997 yang diwujudkan oleh ZANSHIN PLASTIC INDUSTRIAL SDN. BHD. yang memihak kepada

OCBC BANK (MALAYSIA) BHD.,
bagi menjamin amaun yang dinyatakan dalam Pernyataan Butir-Butir yang Ditetapkan berkenaan dengan gadaian yang bertarikh 23 haribulan Jun 1997 telah didaftarkan dan dinomborkan 013 dalam Daftar Gadaian.

Diberikan di bawah tandatangan dan meterai saya, di Butterworth pada 05 haribulan Ogos 1997

(t.t.)

SITI RASIDA BT ABDULLAH
PENOLONG PENDAFTAR SYARIKAT
MALAYSIA

[Borang ini diterjemahkan oleh Peguam Negara, Malaysia, menurut Pemberitahu Undangan No. 12 tahun 1964: PN(SBK)23 Pt.11, P.S. 7/81 Jld.2]

It is clear that the charge as exhibited does not reflect the Fixed Deposit of RM500,000 to comply with the requirement of s. 108(3)(k) of the Act. On the contrary the charge reflects the existence of a debenture and this is in compliance with s. 108(3)(a) of the Act. But what is in issue is the Fixed Deposit not the debenture. In the circumstances it is my judgment that the charge which has not been registered under s. 108(3)(k) of the Act to reflect the Fixed Deposit, is void as against the liquidator.

The defendant however argues that there is no requirement in law to register the Fixed Deposit. Section 108(3)(k) of the Act obliges the defendant to create a charge on the credit balance of the company in any deposit account and to my mind a Fixed Deposit account clearly falls into this category.

The defendant argued that since it had uplifted the Fixed Deposit on 13 June 1998 and had credited the amount thereunder into the company's account with the defendant, and since the defendant was only notified by a letter dated 13 June 1998 and received by the defendant on 16 June 1998 from the plaintiff that the company was no longer able to continue business so that a provisional liquidator could be appointed pursuant to the company's winding-up proceedings and since winding-up only commences upon the lodgment of the statutory declaration with the registrar and since the defendant did not know when this had occurred, the defendant's upliftment of the Fixed Deposit was not caught by the winding-up proceedings.

a I am unable to agree with this. When the defendant uplifted the Fixed Deposit on 13 June 1998, I note from the Form 65A lodged with the registrar pursuant to s. 255(6) of the Act that the same was lodged on 11 June 2002. The said s. 255(6) of the Act reads as follows:

b A voluntary winding up shall commence:

(a) where a provisional liquidator has been appointed before the resolution for voluntary winding up was passed, at the time when the declaration referred to in subsection (1) was lodged with the Registrar; and

c (b) in any other case, at the time of the passing of the resolution for voluntary winding up.

In any case I note that counsel for the defendant did not press this issue in his submission.

d It is pertinent to refer to the Federal Court decision in *Asia Commercial Finance (M) Bhd v. JB Precision Moulding Industries Sdn Bhd (In liquidation)* [1996] 2 CLJ 547 at p. 555 wherein Chong Siew Fai CJ speaking *obiter* had this to say:

e The point as to the requirement of registering the 'memorandum of security deposit' under s. 108 of the Companies Act 1965 was not raised before us. In any event, we agree with the learned trial judge that the said memorandum which was dated 16 August 1988 need not be so registered since sub-para. (k) of s. 108(3) that applied to a document in the nature of the said memorandum did not come into effect until 25 September 1993 while the other sub-paras of the said s. 108(3) in force at the material time on 16 August 1988 had no application. Accordingly, we accept that the said memorandum is not void by reason of non-registration under s. 108(1) of the Companies Act 1965.

f In other words because the memorandum of security deposit for RM26,691 in the *Asia Commercial Finance (M) Bhd.* was dated 16 August 1988 which was long before the amendment to s. 108(3) which included the new (k), the said deposit was held not void by reason of the non-registration under s. 108(1) of the Act. This case is clearly in conflict with the defendant's argument that a Fixed Deposit account need not be registered as a charge.

g In *Arab Malaysian Merchant Bank Bhd. v. Orient Apparel Bhd. & Ors* [2001] 4 CLJ 572 in respect of the applicability of s. 108(3)(k), this is what James Foong J said at p. 581:

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Whether the FD needed to be registered under s. 108(3)(k) of the Act is a point I have already decided in the case of *Bensa*. As explained, these FDs were only evidence of acceptance of deposits of Seow Chee Hong by the bank. It was only when they were used as securities that they fell within the category of 'a charge on the credit balance of the company in any deposit account' as described in s. 108(3)(k) of the Act. Thus, standing by itself these FDs were not caught under s. 108(3)(k) of the Act, but the pledging of these as securities were.

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When such collateral was not registered, they are void against the liquidator – s. 108(1) of the Act. This statutory enactment must, in my view, overrides the bank's right to a lien under common law over these securities. Consequently, as argued, the bank's common law right to a set off cannot be maintained for having no basis to rely on.

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The defendant raised a new issue. Mr. Chan contended that the issue of registration under s. 108(1) of the Act was a red herring. He contended that since the company was insolvent the law of bankruptcy applies pursuant to s. 291(2) of the Act. The said section reads as follows:

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Subject to section 292, in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future and contingent liabilities as are in force for the time being under the law relating to bankruptcy in relation to the estates of bankrupt persons, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding-up and make such claims against the company as they respectively are entitled to by virtue of this section.

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(Section 292 deals with the priority of payment of all unsecured debts).

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Mr. Chan also referred me to s. 41(1) of the Bankruptcy Act 1967 which reads as follows:

Mutual credit and set-off

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Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order is made under this Act and any other person proving or claiming to prove a debt under such order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account and no more shall be claimed or paid on either side respectively.

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Linking these two sections, the defendant referred me to another Federal Court decision, namely *Sime Diamond Leasing (M) Sdn. Bhd. v. JB Precision Moulding Industries Sdn. Bhd. (In liquidation)* [1998] 4 CLJ 557.

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a The facts of that case were as follows:

b The appellant ('the lessor') had entered into an equipment lease agreement dated 30 December 1988 ('the agreement') whereby it had leased to the respondent ('the lessee'), one unit of a Plastic Injection Moulding Machine. Pursuant to the agreement, the lessee had deposited with the lessor a prepaid rent of RM3,958 and a sum of RM64,500 as security for the due performance of the agreement ('the deposits'). Payment of the deposits was evidenced by a memorandum dated 30 December 1988. Clause 14.1(g)(ii) of the agreement provided, *inter alia*, that in the event of a winding-up petition being presented against the lessee, the lessor shall be entitled by written notice to determine and end the lease and to retake possession of the equipment. On 27 March 1990, the lessor gave notice of termination of the agreement on the ground that the presentation of the winding-up petition constitutes a breach of the agreement and, at the same time, demanding payment of the amount outstanding after setting-off the deposits pursuant to cl. 4.3 of the agreement. On 4 April 1990, the lessee was wound up and a liquidator appointed. The liquidator demanded from the lessor the return of the deposits but the lessor refused to comply.

e The lessee's case was that upon presentation of the petition, the claim in respect of the deposits had been reduced to a right of proof and that any other method of claiming the deposits would be barred by the *pari passu* principle of distribution. Furthermore, to give the lessor the right of set-off would, in effect, give it an undue preference, over the general body of creditors, contrary to s. 293 of the Companies Act 1965, read together with s. 53(1) of the Bankruptcy Act 1967, and so the provisions of the agreement which purport to give the right of set-off should be struck down as being in violation of those provisions, and, therefore, void.

f The liquidator succeed both in the High Court and in the Court of Appeal. At the Federal Court two issues were raised:

- g* (i) whether the set-off pursuant to cl. 4.3 of the agreement was a voidable preference under ss. 223 and 293 of the Companies Act, read together with s. 53(1) of the Bankruptcy Act?; and
- h* (ii) If 'no', then whether, the set-off pursuant to the agreement was authorized by s. 41 of the Bankruptcy Act, which is made applicable to insolvent companies by s. 291 of the Companies Act?

In his judgment Edgar Joseph Jr, FCJ said at p. 570 as follows:

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... it is clear law that upon the advent of bankruptcy or liquidation, the rights of contractual set-off are displaced by statutory provisions relating to set-off on insolvency. The applicable legislation relating to set-off on company winding-up is to be found in the statutory provisions governing set-off on bankruptcy. To put it another way, the statutory provisions governing bankruptcy set-off are incorporated by reference into the provisions relating to company winding-up; specifically, ss. 40 and 41 of the Bankruptcy Act, are incorporated by reference to companies by virtue of s. 291(2) of the Companies Act. Section 41 of the Bankruptcy Act is, of course, the section which obliges a creditor who engages in mutual dealings with the company and is also its debtor, to set-off the debts and prove only for the balance.

His Lordship continued:

It is important to note that the case of *Re Kim San Engineers Pte Ltd* [1992] 2 SLR 749 shows – and we agree – that where s. 41 applies, payments which would otherwise be set aside under s. 293 of the Companies Act may yet be retained by the creditor. We hasten to add we do not overlook the case of *JB Precision Moulding Industries Sdn Bhd (In liquidation) v. Asia Commercial Finance (M) Sdn Bhd* [1994] 1 MLJ 734 where the High Court refused to allow a set-off, but with respect this case should be regarded as having been decided *per incuriam* as no reference was made therein to s. 41 of the Bankruptcy Act.

With the greatest respect I do not see how this case can help. The very section that had been specifically included in the Act namely s. 108(3)(k) of the Act has not been considered in *Sime Diamond*. The Federal Court case of *Sime Diamond* was heard on 7 November 1998 and reported in 1998. The case of *JB Precision* that the Federal Court in *Sime Diamond* referred to in its judgment, was the decision of the High Court. The Federal Court's decision which was the appeal from decision of the High Court and which I have referred to earlier, was reported in 1996. It is regrettable that counsel had failed to refer to the views expressed *obiter* by Chong Siew Fai, CJ in respect of s. 108(3)(k) in that case. Further since the Federal Court in *Sime Diamond* did not discuss s. 108(3)(k) in its judgment I decline to follow this decision. I am of the view that the defendant is obliged to register the charge of the Fixed Deposit pursuant to s. 108(3)(k) of the Act and since this was not done I grant the plaintiff an order in terms of Prayers (a)-(f).